72-762

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-762

ALVAREZ REYES,

Petitioner,

against

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

IRVING L. WEINBERGER,
Counsel for Petitioner,
770 Lexington Avenue,
New York, N. Y. 10021.
212-371-5370

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions Involved	3
Statement of Facts	3
The Burden of Proof As To Alibi	6
Reasons for Granting the Writ	10
CONCLUSION	11
APPENDIX A—Verdict Rendered by Justice Culkin	A1
APPENDIX B—Decision of Appellate Division Affirming Judgment	B1
Dissenting Opinion	B3
APPENDIX C—Decision of Court of Appeals Affirming Order of Appellate Division	C1
APPENDIX D—Order of Court of Appeals Denying Reargument and Granting Amendment of the Remittitur	D1

Cases Cited

People v. Caprio, 30 A. D. 956, 294 N. Y. S. 2d 305	10
People v. Johnson, 37 A. D. 2d 733, 323 N. Y. S. 2d 880	10
People v. Laietta, 30 N. Y. 2d 68	11
People v. Russell, 266 N. Y. 147	10
Stump v. Bennett, 8th Cir., 398 F. 2d 111, Cert. Den. 393 U. S. 1001	10, 11

Statute Cited

Title 28 U. S. C. Sec. 1257, subd. (3)	2

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STATE OF NEW YORK,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioner, Alvarez Reyes, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York rendered in these proceedings on September 28, 1972.

Opinions Below

The petitioner was found guilty of the charge of selling narcotics by the Supreme Court, New York County (Gerald P. Culkin, J.). Said Court rendered no formal opinion. The oral verdict was recorded at pages 74-75 of the trial minutes; it is set forth in Appendix A hereto. The trial court's sentence for an indeterminate term, with a maximum of four years, was recorded at page 78 of the trial minutes.

Upon appeal to the Appellate Division, First Department, said conviction was affirmed by a divided court, with two justices dissenting. The majority and minority opinions are reported in 38 A. D. 2d 921, 329 N. Y. S. 2d 955. Said opinions are set forth in Appendix B hereto.

Upon further appeal to the New York Court of Appeals, the order of the Appellate Division was unanimously affirmed, without opinion, on July 6, 1972. The Reporter's Memorandum of affirmance is reported in 30 N. Y. 2d 881, 335 N. Y. S. 2d 432. Said memorandum is set forth in Appendix C hereto.

Thereafter the petitioner moved in the Court of Appeals for reargument of said appeal and for an amendment of the remittitur to reflect the presence of a constitutional issue in the case. By order dated September 28, 1972, reargument was denied. However, the motion to amend the remittitur was granted. Said order has not yet been published in the official or non-official reports. It is set forth in Appendix D hereto.

Jurisdiction

The order of the Court of Appeals, denying reargument and granting amendment of the remittitur, is dated September 28, 1972. This petition for certiorari has been filed less than 90 days from the date aforesaid. Jurisdiction of the Court is invoked under Title 28 U. S. C. Sec. 1257, subd. (3).

Questions Presented for Review

1. Did the Trial Judge deny the petitioner a fair trial and violate due process of law by imposing upon him the burden of establishing his alibi defense that he was not present at the time and place of the first alleged sale of narcotics on June 22, 1970?

2. Did the Trial Judge deny the petitioner a fair trial and violate due process of law by convicting with respect to the alleged first sale of narcotics in June 22, 1970, even though he acquitted the petitioner of the identical crime, allegedly committed on June 25, 1970, at the same site and in the presence of the same two police officers?

Constitutional Provisions Involved

The relevant portion of Amendment V provides: "No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law".

The relevant portion of Amendment XIV provides: "* * * nor shall any State deprive any person of life, liberty or property without due process of law".

Statement of Facts

The petitioner was charged with selling five glassine envelopes of heroin to an undercover detective for $15 on June 22, 1970; he was not arrested on that occasion. Another count in the indictment charged the petitioner with selling the same quantity of heroin for the same price to the same detective at the same site on June 25, 1970; he was arrested immediately after said sale. Petitioner was found guilty of the first sale.

The Second Sale: The prosecution's evidence with respect to the second sale was unsatisfactory. The detective who allegedly purchased the heroin, and his cover man who later made the arrest, both testified that the sale took place at 2:00 P.M. and that the arrest was made promptly thereafter at 2:00 P.M. However, their testimony as to events which occurred between sale and arrest made it impossible for the arrest to have followed immediately upon the sale. After the alleged sale, the two officers departed from the site; they met each other at a prearranged rendezvous some distance away; they placed the heroin in an envelope which

they identified and sealed; they procured a truck with a 2-way radio for the undercover detective; and they finally returned to the site of the crime to make the arrest at 2:00 P.M.

The undercover detective had allegedly paid $15 to the petitioner when he purchased the heroin at 2:00 P.M. The cover man, who made the arrest, failed to find the $15 on the petitioner's person when he searched him in the course of the arrest at 2:00 P.M. All that turned up in the search was a $50 bill, but no heroin.

The petitioner explained his presence at that site on the day of the arrest by testifying that he had an appointment to go to the Bronx with another person. His nephew, Rivera, was to accompany them because the petitioner spoke no English. While waiting for the other person to arrive, the petitioner and his nephew spent approximately an hour playing pool in a little social club which the petitioner owned, located in the street where he was later arrested. Soon after they emerged from said club, a police car pulled up and the arrest was made. Both the petitioner and his nephew swore that no sale of narcotics had been made in the preceding hour. They both swore that they had never seen the undercover detective who was the alleged purchaser.

On the proof summarized above, the trial judge acquitted the petitioner, holding that the defendant had "*created a situation* wherein the People have failed to prove that part of the case beyond a reasonable doubt".

The First Sale: However, the trial judge found the petitioner guilty of making the prior sale of five envelopes for $15, at the same site, to the same detective, because on the first occasion the defendant had failed to sustain the burden of "creating a situation" which would cause the People to fail in their effort to prove said crime.

The difficulty of identifying suspects in narcotics cases has resulted in a rule of thumb, adopted by police officers and prosecuting attorneys, that a case will not be prosecuted unless the officer can establish two sales. So, in the instant case, proof of the latter sale should have been a relatively simple matter because an arrest followed immediately upon the alleged sale. Such proof would naturally induce the trier of the facts to conclude that the first sale had also occurred, even though it did not result in an arrest.

The testimony of the undercover detective as to the first sale was self-contradictory. On direct, he testified that he approached the petitioner because he had seen him making a sale to another customer. On cross, he testified that he approached the petitioner because some unknown person, presumably an addict, pointed the petitioner out as a man who had narcotics to sell.

The cover man, who observed the first alleged conversation between the detective and the petitioner, made no mention of the customer described in the detective's direct testimony, or of the addict described in the cross-examination. When questioned about the second sale, the cover man was asked if he saw the detective speaking to an *unknown male*. He did not speak up and inform the district attorney that the seller was known to him because he had observed him in a transaction three days earlier. In testifying to the arrest which he made following the second sale, the cover man stated that the detective was then sitting on a truck with a radio; and he identified the petitioner as the man who had made the second sale. The arresting officer did not explain why he required such identification if he had indeed observed the petitioner in two sale transactions, one on June 22nd and one on June 25th, just moments before the arrest.

The Burden of Proof As To Alibi:

In respect of the first sale, the petitioner denied that he was present at the scene, East 121st Street, at any time on June 22, 1970. The detective testified that he purchased five envelopes on that date at about 5:25 P.M.

The petitioner testified that he was employed as a superintendent of several apartment buildings earning a salary of $192 per week. He had never been arrested previously. On June 22nd he commenced work at 7:00 A.M., assisting a painter on East 74th Street. Departing from said building at 4:30 P.M., he proceeded to a building on East 81st Street to take care of garbage disposal. Thereafter he picked up his son at 115th Street and brought him to their home at 117th Street. After eating supper, the petitioner remained in his apartment all night.

The trial court refused to accept the petitioner's account of his activities on June 22nd. In the course of his direct testimony, Justice Culkin conducted a gruelling cross-examination of the defendant, the purpose of which was to challenge the defendant to establish his defense of alibi beyond a reasonable doubt. The minutes reflect the following (page 32):

> "The Court: Do you remember the day you got arrested, locked up?
>
> The Defendant: Yes, I remember being locked up. Yes, I remember the day we are talking about.
>
> The Court: What day are you talking about?
>
> The Defendant: About June——
>
> The Court: I am talking about something else. On June 22, did anyone approach you, and ask you for any drugs—whether you had any?
>
> The Defendant: I wasn't at home.
>
> The Court: I am asking you about day you got locked up, does he remember that day?

The Defendant: Yes.

The Court: Where were you in front of—what street?

The Defendant: 121 Street when they arrested me.

The Court: Is that the day you got arrested?

The Defendant: I was in front of 225 121st Street.

The Court: Are you familiar with that street?

The Defendant: Yes.

The Court: What were you doing there?

The Defendant: We were going to the Bronx.

The Court: Who is we?

The Defendant: My cousin and my nephew.

Mr. Thurschwell: Had you been working down at 81st Street?

The Defendant: That was about the time they arrested me.

The Court: He wasn't working on 81st Street on that day.

Mr. Thurschwell: It's a different date.

The Court: I know. Counsel very well admits he is a working man, he's good for so much a week down at 81st Street. Isn't it correct on this day at 225 121st Street is the location where the police arrested him. He admits he is familiar with the location?

The Defendant: That's correct.

The Court: Where does your cousin live?

The Defendant: 104 Street.

The Court: Why did he go 121 Street in that neighborhood?

The Defendant: Because he had to go to the Bronx.

The Court: Why were you going there?

The Defendant: Since I didn't speak English somebody had to take me to the Bronx.

The Court: Where did you find the somebody?

The Defendant: I was waiting for him there.

The Court: Where?

The Defendant: On 121st Street.

The Court: Where were you arrested?

The Defendant: When they arrested me I was at 225, I was talking to a few people who lived there.

The Court: You were arrested though?

The Defendant: Yes."

At page 45 of the Minutes, in his cross-examination, the defendant was again being questioned with respect to his alibi. That subject once again stimulated the Court to inject itself into the questioning, as follows:

"Mr. Friedman: On June 22, you know what you did after 5:00 that night?

The Defendant: I picked up my son and went home.

Mr. Friedman: What about the 23rd?

The Defendant: I came to Court.

The Court: You came to court for what?

The Defendant: For what happened to Santos Ortiz.

The Court: What did you do the next day?

The Defendant: I don't remember, I don't know.

The Court: What about the day after that one?

The Defendant: That was the day I was arrested.

The Court: You went out to sell drugs before you were arrested.

The Defendant: No.

The Court: You were not selling drugs, the police lied, is that right? Detective Webster did not buy anything from you on June 22, or on June 25 at 219 East 121 Street?

The Defendant: I never sold drugs."

The language in which the trial court framed its verdict indicates decisively that the defendant was convicted of

selling on the first occasion because he had failed to meet the burden of proof cast upon him to establish that he was not present at the time and place of the sale. The testimony quoted above shows that in the Court's mind, if the defendant was present on the second occasion when he was arrested, he had a duty to prove to the Court that he was not there on the prior occasion when he was not arrested. The verdict reads as follows (page 74):

> "The Court: The Court finds the defendant guilty of the crime of criminally selling a dangerous drug in the third degree, under the first count of the indictment.
>
> As to the other counts of the indictment, the People—the Court feels that it should give the benefit of the doubt to the defendant, that the defendant has created a situation wherein the People have failed to prove that part of the case beyond a reasonable doubt. And, therefore, the other counts of the indictment are dismissed".

In the court of first instance, the trial ended upon the rendition of such verdict. Only after the termination of the trial did it become clear to the petitioner that the burden of proof had been shifted upon him to establish alibi and that the conviction resulted because, in the opinion of the trial court, he had failed to sustain said burden.

In the Appellate Division, the issue of shifting the burden of proof was presented in the argument. The testimony quoted above was set forth verbatim in the Appellant's Brief. His counsel cited New York decisions which hold that a defendant does not have the burden of proving alibi; that a defendant is not required to establish that it was impossible for him to have committed the crime; that a defendant is not required to prove the alibi beyond a reasonable doubt; and that the burden of proving guilt is

always on the prosecution and may never be shifted (*People* v. *Russell,* 266 N. Y. 147; *People* v. *Caprio,* 30 A. D. 2d 956, 294 N. Y. S. 2d 305; *People* v. *Johnson,* 37 A. D. 2d 733, 323 N. Y. S. 2d 880).

The decision of the Appellate Division quoted the Trial Court's verdict. It affirmed said verdict on the grounds that the issue was one of credibility and that the defendant's testimony as to alibi was not corroborated. In respect of convicting on the first sale and acquitting on the second, the Appellate Division sustained the judgment on the grounds that the two charges were separable, and consistency in the verdict is not necessary.

The two constitutional issues underlying this petition were argued in the Court of Appeals. Its amended remittitur reflects that they were considered and that in the Court's opinion, the conviction did not violate the defendant's constitutional rights.

Reasons for Granting the Writ

The subject of shifting the burden of proof upon a defendant to establish an alibi defense was carefully considered in *Stump* v. *Bennett,* 8th Cir., 398 F. 2d 111, Cert. Den. 393 U. S. 1001. Said decision held that shifting the burden creates an irrational and arbitrary presumption of guilt; "incriminating presumptions are not to be improvised by the judiciary" (page 116). Prejudice results because the trier of the facts is compelled to believe the state's evidence relating to the defendant's presence at the scene unless the defendant is able to overcome its effect by preponderating proof (page 119). Proof of the defendant's presence at the scene is an indispensable factor in the prosecution's case, a *sine qua non* to sustain a verdict of guilty. Shifting the burden on said issue

requires the defendant to prove his non-presence (pages 119-120). A defendant is deterred thereby from offering evidence in his full defense. "Any deterrent to the right to be heard in full and to offer evidence in defense of life or liberty violates the oldest and deepest rooted foundation of due process" (page 121).

The New York Court of Appeals was fully mindful of the decision in *Stump* v. *Bennett,* because it cited said decision in *People* v. *Laietta,* 30 N. Y. 2d 68, decided in 1972 several months prior to the determination in the instant case.

All of the propositions set forth in *Stump* v. *Bennett* apply in the instant case. The record unequivocally shows that the burden of proving alibi was placed upon the defendant, thereby depriving him of due process of law.

CONCLUSION

Petitioner respectfully prays that this Court should review the determination of the New York Court of Appeals by granting a writ of certiorari.

Respectfully submitted,

IRVING L. WEINBERGER
Counsel for Petitioner
770 Lexington Avenue
New York, N. Y. 10021
212-371-5370

APPENDIX A

Verdict Rendered by Justice Culkin

The Court: Denied.

The Court finds the defendant guilty of the crime of criminally selling a dangerous drug in the third degree, under the first count of the indictment.

As to the other counts of the indictment, the People—the Court feels that it should give the benefit of the doubt to the defendant, that the defendant has created a situation wherein the People have failed to prove that part of the case beyond a reasonable doubt. And therefore, the other counts of the indictment are dismissed.

APPENDIX B

Decision of Appellate Division Affirming Judgment

4916. *People &C, res.* v. *Alvarez Reyes, def-ap.* Judgment, Supreme Court, New York County (Culkin, J.) rendered Sept. 28, 1971, convicting defendant after a non-jury trial of criminally selling a dangerous drug in the third degree and sentencing him to an indeterminate term of imprisonment not to exceed four years, is affirmed.

The indictment charged defendant with the sale, possession with intent to sell, and possession of heroin on two separate occasions. Counts one, two and three charged the sale, possession with intent to sell, and possession of heroin on June 22, 1970. Counts four, five and six charged defendant with committing the same crimes on June 25, 1970. The court found defendant guilty of the first count alleging the sale of heroin on June 22, 1970. All counts relating to the date of June 25, 1970 were dismissed.

At the trial, the detective who allegedly made the purchase on both dates in question testified as to the events of the sales. On each occasion he gave a signal to a patrolman who was part of the cover team to indicate that a sale had been consummated. And on each occasion the detective met with the patrolman at a pre-arranged location where the glassine envelopes were sealed and marked. On the date of the second alleged sale, i.e. June 25, 1970, the defendant was arrested.

Defendant denied making any of the sales alleged. As to the first date, he testified that he was at work until 4:30 and thereafter went to pick up his son. He denied being in the location where the detective stated the sale took place. Other than defendant's testimony, no other evidence was offered to support the defendant's alibi.

With regard to the second alleged sale, defendant's nephew testified that he was with defendant for approximately one hour prior to the time the officers appeared and arrested defendant. The nephew stated that at no time during that period did defendant possess narcotics or engage in any transaction involving narcotics. At the conclusion of the trial the court stated:

> "The court finds the defendant guilty of the crime of criminally selling a dangerous drug in the third degree under the first count of the indictment.
>
> "As to the other counts of the indictment, • • • the court feels that it should give the benefit of the doubt to the defendant, that the defendant has created a situation wherein the People have failed to prove that part of the case beyond a reasonable doubt".

The court therefore credited the testimony of the detective with relation to the sale of June 22, 1970. As stated by defendant's trial counsel, the sole question in this case is "who is to be believed." The general rule is that credibility of witnesses is an issue of fact for the fact finder. (See *People* v. *Regina,* 19 N. Y. 2d 65; *People* v. *Horton,* 308 N. Y. 1; *People* v. *Farrell,* 2 A. D. 2d 797). There is no reason in this case for this court to substitute its judgment for that of the trial court. The trial court had before it the detective whose testimony was corroborated by the patrolman, who observed the defendant in conversation with the detective; who observed the signal indicating the sale had been completed; and who met thereafter with the detective whereupon the

glassine envelopes were sealed and marked. On the other hand, the defendant's testimony to establish an alibi was uncorroborated.

The fact that the trial court dismissed the charges with relation to the alleged sale on June 25, 1970 does not require dismissal of the charges growing out of the events which occurred on the earlier date. The finding of guilt on the June 22 incident was not inherently inconsistent with acquittal of the charges growing out of the alleged subsequent sale, as the events were entirely separable. In any event, consistency in the verdict is not necessary (*People* v. *O'Bryan,* 36 A. D. 2d 548; *People* v. *Delorio,* 33 A. D. 2d 350). See also CCP section 443-a.

All concur, except Kupferman and Murphy, JJ., who dissent in the following memorandum by Murphy, J.

Dissenting Opinion

All concur except Kupferman and Murphy, JJ., who dissent in the following memorandum by Murphy, J.

Since the trial court (a jury having been waived) refused to credit the testimony of the undercover narcotics officer as to the alleged sale on June 25, 1970, it is difficult to see how, on the record here presented, the same witness' testimony could be believed as to the sale allegedly made to him by the appellant three days earlier (when no arrest was made).

There certainly was ample justification for acquitting appellant as to the second sale: even if we disregard the testimony of appellant's nephew. With regard to such sale, the undercover officer testified that appellant sold him five glassine envelopes containing heroin for $15,

and the other member of the undercover officer's "cover team" testified that promptly thereafter he arrested appellant and searched him. Significantly, neither narcotics nor the $15 allegedly given appellant was found.

While it is, of course, true that the credibility of witnesses is generally an issue for the fact-finder (*People* v. *Regina,* 19 N. Y. 2d 63), we have not hesitated to reverse a conviction where we concluded that a defendant's guilt was not established beyond a reasonable doubt (*People* v. *Patterson,* 21 A. D. 2d 356). Accordingly, since there appears to be no additional evidence as to the June 22, 1970 sale which could be offered, the judgment of conviction should be vacated and the indictment dismissed.

If I was not dissenting on the affirmance of the conviction, I would certainly dissent on affirmance of the sentence. Since appellant was never previously arrested for, or convicted of any crime and his prior employment record, as attested to by his employer, was commendable, the sentence imposed was excessive.

Order filed.

APPPENDIX C

Decision of Court of Appeals Affirming Order of Appellate Division

30 N. Y. 2d 881

People, etc., Respondent, v. *Alvarez Reyes, Appellant*

Court of Appeals of New York

July 6, 1972.

Appeal from the Supreme Court, Appellate Division, First Department, 38 A. D. 2d 921, 329 N. Y. S. 2d 955.

Defendant was prosecuted for criminal sales of dangerous drug in the third degree. The Supreme Court, New York County, Gerald P. Culkin, J., entered judgment finding him guilty on the first count alleging sale of heroin but dismissed all other counts relating to offenses on a later date, and the defendant appealed.

The Appellate Division affirmed. It held that the credibility of prosecution testimony as to the first alleged sale as charged in the first count was for the trier of fact although the defendant was acquitted of offense charged in other accounts. It held further that there was no inherent inconsistency nor was consistency necessarily required though the same prosecution witnesses testified to all alleged offenses. The defendant appealed.

In the Court of Appeals the People contended that the guilt of criminally selling a dangerous drug in the third degree was proven beyond a reasonable doubt and that the finding on weight of evidence was not properly reviewable before the Court of Appeals. It further asserted that the defendant was properly tried for two sales of heroin in a single indictment and that in any event his failure to object to the indictment in the trial court precluded him from doing so on appeal.

• • •.

Order affirmed.

All concur.

APPENDIX D

Order of Court of Appeals Denying Reargument and Granting Amendment of the Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-eighth day of September A. D. 1972.

Present, HON. STANLEY H. FULD, *Chief Judge, presiding.*

Mo. No. 610

THE PEOPLE &c.,

Respondent,

vs.

ALVAREZ REYES,

Appellant.

A motion for reargument and to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted.

The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether the rights of the defendant under the Fifth and Fourteenth Amendments were denied. Defendant argued that the disparity of the disposition of the two charges against him by the trial court violated due process and that the trial court cast the burden on the defendant to prove his alibi. The Court of Appeals considered these contentions and held that there was no violation of defendant's constitutional rights.

And the Supreme Court, New York County, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Gearon Kimball
Deputy Clerk